**APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DECIDED MARCH 10, 2008**

**In the**
**UNITED STATES COURT OF APPEALS**
**for the Seventh Circuit**

No. 06-2777

ASHER B. HILL,

*Petitioner-Appellant,*

*v.*

BILL WILSON, Superintendent,
Westville Correctional Facility,

*Respondent-Appellee.*

Argued February 22, 2008—Decided March 10, 2008

Before EASTERBROOK, *Chief Judge*, and BAUER and POSNER, *Circuit Judges.*

EASTERBROOK, *Chief Judge.* Asher Hill entered a liquor store in Indianapolis, shot the clerk, and stole the contents of the cash register. For this conduct he has been convicted of several offenses and sentenced to life imprisonment without possibility of parole, because his many convictions make him a habitual offender under Indiana law. The clerk survived and was prepared to testify against Hill but suffered a

heart attack just before trial. The judge postponed the trial for two months; Hill contends, in this proceeding under 28 U.S.C. § 2254, that by doing this the judge violated two of his constitutional rights. The state judiciary rejected these arguments, *Hill v. State*, 773 N.E.2d 336 (Ind.App.2002), 777 N.E.2d 795 (Ind.App. 2002), as did a federal district judge, *Hill v. McBride*, 2006 U.S. Dist. LEXIS 39599 (N.D.Ind. Mar. 30, 2006).

Hill invokes the speedy trial clause and the right to choose between counsel and self-representation. The state judge violated both rights at once, he maintains, by deferring the trial until the clerk had recovered. Hill, who was representing himself in the state proceedings, opposed the delay on the basis of the state's speedy-trial statute, which provides that a trial may not be postponed on account of a missing witness when the defendant agrees that the prosecutor may use, as evidence, the prosecutor's version of what the witness would say if available to testify. Ind.Code § 35-36-7-2(b)(1). Hill agreed that the prosecution could introduce a narrative summarizing the clerk's likely testimony. Evidently he thought that such an antiseptic presentation would resonate less with the jury than the appearance in court of a victim who would identify Hill as the assailant and add details that might be omitted from a summary. The trial judge refused to proceed, however, stating that he thought it inappropriate to conduct a proceeding that could end in life imprisonment without the principal victim and witness. The state's appellate court held this decision a mistake, given § 35-36-7-2(b)(1), but affirmed the conviction because

Hill received a fair trial that satisfied all constitutional requirements.

Hill insists that the violation of state law also offends the federal Constitution. The speedy-trial clause allows a trial to be postponed for a good reason, he allows, but this postponement (which lasted 56 days) was for a bad reason—at least as Indiana classifies reasons for delay. Moreover, he maintains, by rejecting his willingness to proceed on a written summary of the clerk's evidence the judge violated his right to self-representation. See *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

A federal court may afford relief to a state prisoner if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States". 28 U.S.C. § 2254(d)(1). Hill does not identify any decision of the Supreme Court holding that even remotely comparable events violate the Constitution. Instead he invokes principles of very high generality—such as *Faretta*'s holding that there is a right of self-representation—and argues that these principles cover the waterfront. That's not sound; he might as well point to the Bill of Rights itself. The Supreme Court has held that a right becomes "clearly established" only when a course of decisions has established how the Constitution's grand generalities apply to a class of situations. See, e.g., *Wright v. Van Patten*, __ U.S. __, 128 S.Ct. 743, 169 L.Ed.2d 583 (2008); *Carey v. Musladin*, 549 U.S. 70, 127 S.Ct. 649, 166

L.Ed.2d 482 (2006). Indiana did not transgress any right "clearly established" by this standard; indeed, the state court did not commit a constitutional error by *any* standard.

We start with self-representation. A court cannot interpose an unwanted lawyer between the defendant and the tribunal or refuse to accept from the defendant motions that it would entertain if made by counsel. See *McKaskle v. Wiggins*, 465 U.S. 168, 178-79, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). The state judge did not do either of these things. Hill can prevail only if the sixth amendment creates a rule that motions made pro se must be granted (or, perhaps, that no state court may err in ruling on a proposal made by a defendant who represents himself). No decision of the Supreme Court clearly establishes such a right.

The state judge said enough to show that he would have postponed the trial whether or not Hill was representing himself. A request that would be denied, if presented by counsel, may be denied if presented by the accused personally. Hill's argument entails the proposition that, if he had chosen to be represented by counsel, who (like Hill) had consented to the use of a proffer in lieu of testimony, and the judge had postponed the trial nonetheless, then the state would have violated Hill's right to have the assistance of counsel for his defense. The problem that occurred in this proceeding is unrelated to the right to have or abjure counsel's aid. The judge did not refuse to allow Hill to dispense with counsel, or establish a category of arguments that only

a lawyer can present, but simply made an error of state law when deferring the trial. And errors of state law do not justify collateral relief under § 2254. See, e.g., *Gilmore v. Taylor*, 508 U.S. 333, 342, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993); *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

As for the right to a speedy trial: Hill enjoyed one. The trial occurred almost exactly one year after Hill's arrest and less than two months after the hearing at which he proposed to dispense with the clerk's testimony. The Supreme Court has never suggested that so brief an interval between arrest and trial violates the Constitution—though it has held that much longer delays do not. See, e.g., *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972) (five years and three months); *United States v. Loud Hawk*, 474 U.S. 302, 106 S.Ct. 648, 88 L.Ed.2d 640 (1986) (more than seven years). Hill tries to bootstrap an error of state law into a violation of the Constitution by arguing that the state law shows that the reason for delay was impermissible. What reasons for delay count as good and bad for constitutional purposes depends, however, on the Constitution rather than state law.

The reason that Hill wants to label a bad one-waiting for the restoration to health of a major witness—is one that the Supreme Court has included in the category of good reasons for delay. See *Barker*, 407 U.S. at 531, 92 S.Ct. 2182 ("a valid reason, such as a missing witness, should serve to justify appropriate delay"). Live

testimony has value even when the defense prefers a paper substitute:

> [T]he prosecution is entitled to prove its case by evidence of its own choice, or, more exactly, . . . a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it. The authority usually cited for this rule is *Parr v. United States*, 255 F.2d 86 (CA5), cert. denied, 358 U.S. 824, 79 S.Ct. 40, 3 L.Ed.2d 64 (1958), in which the Fifth Circuit explained that the "reason for the rule is to permit a party 'to present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight.' " 255 F.2d, at 88 (quoting *Dunning v. Maine Central R. Co.*, 91 Me. 87, 39 A. 352, 356 (1897)). . . . Unlike an abstract premise, whose force depends on going precisely to a particular step in a course of reasoning, a piece of evidence may address any number of separate elements, striking hard just because it shows so much at once; the account of a shooting that establishes capacity and causation may tell just as much about the triggerman's motive and intent. Evidence thus has force beyond any linear scheme of reasoning, and as its pieces come together a narrative gains momentum, with power not only to support conclusions but to

> sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict. This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.

*Old Chief v. United States*, 519 U.S. 172, 186-87, 117 S.Ct. 644, 136 L.Ed.2d 574 (1997). States are free to take a different view, but they do so as a matter of their own law. The Constitution's meaning does not change from state to state, and year to year, according to the majority vote of a local legislature.

The best way to conduct analysis under § 2254 is to assume that the state wants to act exactly as its officers (including its judges) have done, and then ask whether the federal Constitution countermands that decision. See, e.g., *Gordon v. Degelmann*, 29 F.3d 295, 300-01 (7th Cir.1994); *United States v. Martin*, 399 F.3d 879 (7th Cir.2005). The Constitution does not prevent a state from waiting two months for the principal witness (and victim) to recover and testify in person. See *Barker*, 407 U.S. at 521-22, 92 S.Ct. 2182 ("If, for example, the State moves for a 60-day continuance, granting that continuance is not a violation of the right to speedy trial unless the circumstances of the case are such that further delay would endanger the values the right protects."). It follows that Indiana has not contravened any clearly established rule of federal law.

AFFIRMED

## APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION ENTERED MARCH 30, 2006

**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF INDIANA**
**HAMMOND DIVISION**

NO. 2:04-CV-506 PS

ASHER HILL,

Petitioner,

v.

DAN MCBRIDE,

Respondent.

### OPINION AND ORDER

On December 7, 2004, *pro se* Petitioner Asher Hill, an inmate at the Maximum Control Facility in Westville, Indiana, filed a Petition pursuant to 28 U.S.C. § 2254. The Response to the order to show cause filed by the Attorney General of Indiana demonstrates the necessary compliance with *Lewis v. Faulkner*, 689 F.2d 100 (7th Cir.1982). For the following reasons, Hill's Petition is denied.

*Appendix B*

## I. FACTS

The facts as detailed below come from the Indiana Court of Appeals opinion from the direct appeal in this matter. *See Hill v.. State*, 773 N.E.2d 336 (Ind.Ct.App. 2002). In summary, on May 9, 2000, a robber entered a liquor store in Indianapolis and shot the cashier. The robber insisted that a patron open the cash register. The patron was unable to do so, and therefore unplugged the register and gave it to the robber. The robber then ordered the patron to the floor. While on the floor, the patron got a good view of the robber's legs and feet. The robber then threw the cash register to the ground, kicked it open and took money out. The robber was described as an African-American male, five feet, eleven inches tall, who was wearing jean shorts, white tube socks, tennis shoes and a long sleeve, hooded white jacket. After the robber left the store, the patron got up from the floor and called the police. The call came in to police dispatch at 9:43 p.m.

Two minutes later at 9:45 p.m., a witness saw a gray Mazda run into a tree approximately one-half mile north of the liquor store that had been robbed. He then called the police to report the accident. Before the police could arrive, however, Park Ranger Jerald Knuckles happened upon the scene and saw the Mazda up against the tree with the engine running and the windshield wipers on. He went up to the car to investigate, but it was empty. Knuckles opened the car door and saw a gun on the passenger seat, which he recovered. Money was also found strewn about near and in the car. Also found abandoned in the area was a beige-colored jacket.

Ballistics tests later confirmed that the gun recovered from the Mazda was the same weapon that was used to shoot the cashier at the liquor store. Hill's fingerprints were found on the driver's side window of the Mazda, and it was proved that the Mazda belonged to Hill's ex-girlfriend. There was further evidence linking Hill to the Mazda. Approximately a month before the robbery, he had been pulled over in that car during a routine traffic stop.

At around 9:45 p.m. on the night of the robbery, Hill knocked on the door of a home in the area of the robbery. He told the owner of the home that he had just been carjacked, and the homeowner described Hill as out of breath. Hill was wearing jean shorts, tennis shoes and white socks. Because she thought it unusual that Hill did not report the carjacking to the police, the owner of the home called 9-1-1. The police arrived on the scene within minutes of the homeowner's call. Hill had $392 in cash on him mostly in fives and tens. The police then brought the witness from the liquor store to the location to see if he could identify Hill as the robber. The witness identified Hill's shoes and jeans as consistent with the clothing that the robber was wearing.

## II. PROCEDURAL HISTORY

At a trial by jury, Hill was convicted of robbery, criminal confinement and carrying a handgun without a license in May of 2001. *See Hill*, 773 N.E.2d at 340. Because he was found to be a habitual offender, Hill was sentenced to life without parole. *Id.* Hill filed a direct

appeal of his conviction, arguing that: (1) his right to a speedy trial was violated; (2) the trial court violated his right to self representation when it granted the state a continuance over his objection; (3) the combined effect of the trial court's rulings denied him complete and freely administered justice under the Indiana Constitution; and (4) his convictions were not supported by sufficient evidence. (Resp.Ex.D.) The Indiana Court of Appeals affirmed Hill's conviction on direct appeal. *See Hill*, 773 N.E.2d at 339. As the opinion issued by the court of appeals did not address certain speedy trial issues raised in Hill's brief, Hill filed a petition for rehearing. The court of appeals granted the petition, but ultimately affirmed Hill's conviction. *See Hill v. State*, 777 N.E.2d 795, 799 (Ind.Ct.App.2002).

Hill then filed a petition to transfer to the Indiana Supreme Court. In his petition, Hill first argued that the Indiana Court of Appeals erroneously determined that Hill waived any speedy trial objections when he did not renew his objection and move for discharge after the trial court specifically stated that it was granting a continuance over his objection. (Resp. Ex. H at 5.) Hill further argued that the court of appeals erred in holding that Hill's speedy trial and self-representation rights were not prejudiced when the trial court erroneously continued his trial. (*Id.* at 7.) Hill also included a catch-all paragraph, attempting to preserve his other arguments raised in his direct appeal to the Indiana Court of Appeals. (*Id.* at 9.) The petition to transfer was denied. *See Hill v. State*, 792 N.E.2d 35 (Ind.2003).

Hill then filed a petition for post conviction relief (PCR), alleging ineffective assistance of both trial and appellate counsel. (Resp. Ex. J at 14, 30, 34.) He also continued to argue that his conviction was not supported by sufficient evidence as well as several other claims not raised on direct appeal. (*Id.* at 34-75.) The Indiana Court of Appeals affirmed the post conviction court's finding that Hill had not demonstrated that either of his counsel was ineffective and held that he had waived the right to raise the freestanding claims. (*Hill v. State*, No. 49A02-0401-PC-82 (Ind.Ct.App. Aug. 30, 2004), Resp. Ex. L.) Hill filed a petition to transfer to the Indiana Supreme Court in September 2004, alleging that the Indiana Court of Appeals erroneously concluded on direct appeal that his counsel had waived Hill's right to a speedy trial. (Resp.Ex.M.) In his amended petition to transfer to the Indiana Supreme Court in October 2004, Hill alleged that the state failed to produce sufficient evidence to support his Class A felony conviction and that his appellate counsel was ineffective for failing to present these evidentiary issues on direct appeal. (Resp.Ex. N.) These petitions to transfer were also denied. *See Hill v. State*, 822 N.E.2d 980 (Ind.2004); (Pet.'s Am. Traverse, Ex. D [Doc. 38].)

In the Petition before this Court, Hill's claims are (1) that the state failed to produce sufficient evidence of every element of robbery as a Class A felony; (2) that the Indiana Court of Appeals erred when it held that Hill could not personally object to vacating the February 12, 2001 trial date because he was represented by counsel; (3) that the Indiana Court of Appeals

erroneously determined that trial counsel was not ineffective; (4) that the Indiana Court of Appeals erroneously determined that appellate counsel was not ineffective; (5) that the Indiana Court of Appeals erroneously determined that Hill waived any speedy trial objections to postponement of the trial date during the March 16, 2001 pretrial conference; and (6) that the Indiana Court of Appeals erroneously determined that the trial court's postponement of the trial date during the March 16, 2001 pretrial conference did not unduly interfere with Hill's Sixth Amendment right to self representation.

## III. DISCUSSION

### A. Petitioner's first, second and fifth claims are barred by procedural default.

"The procedural default doctrine . . . normally will preclude a federal court from reaching the merits of a habeas claim when either (1) that claim was presented to the state courts and the state-court ruling against the petitioner rests on adequate and independent state-law procedural grounds, or (2) the claim was not presented to the state courts and it is clear that those courts would now hold the claim procedurally barred." *Perruquet v. Briley*, 390 F.3d 505, 514 (7th Cir.2004). The first type of procedural default prevents a federal court from "review[ing] a question of federal law if it determines that the state decision rests on a state procedural ground that is independent of the federal question and adequate to support the judgment."

*Page v. Frank*, 343 F.3d 901, 905 (7th Cir.2003). Or, in other words, "the independent and adequate state ground doctrine bars federal habeas when a state court has declined to address a prisoner's federal claims because the prisoner has failed to meet a state procedural requirement." *Id.* (citations and alterations omitted).

For this doctrine to apply, the last state court ruling on the claim must clearly and plainly state that the judgment rests on a state procedural bar. *See Harris v. Reed*, 489 U.S. 255, 260-61 (1989). Furthermore, the procedural rule must be applied in a " 'consistent and principled way.' " *Page*, 343 F.3d at 908-09 (citation omitted). Essentially, the state procedural rule must be firmly established and regularly followed. *Id.* at 909. A state decision that rests on a rule applied infrequently, unexpectedly, or inconsistently may be inadequate grounds for procedural default, as it suggests that the state is discriminating against the federal right asserted. *Id.* (citation omitted).

The procedural default doctrine also precludes federal courts from reaching the merits of a habeas petition if the petitioner did not fairly present his federal claims to the appropriate state courts, and those state courts would now hold the claims procedurally barred. *Perruquet*, 390 F.3d at 514. To fairly present his claims to the state court, the petitioner must articulate both the operative facts and the controlling legal principles on which his federal claim is based. *See id.* at 519. These operative facts and law must appear in the text of the

petition and accompanying briefs, as the state court is not required to look to lower court opinions to find the federal nature of the claim. *Baldwin v. Reese*, 541 U.S. 27, 32 (2004); *Perruquet*, 390 F.3d at 521.

This doctrine "is designed to give the state courts a full and fair opportunity to resolve federal constitutional claims before those claims are presented to the federal courts[.]" *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). This means that the petitioner must "invok[e] one complete round of the State's established appellate review process." *Id.* This does not mean that the petitioner must necessarily file a state habeas petition after completing his one full round on direct appeal in the state courts. *Castille v. Peoples*, 489 U.S. 346, 349-50 (1989) (noting that "once the state courts have ruled upon a claim, it is not necessary for a petitioner 'to ask the state for collateral relief, based upon the same evidence and issues already decided by direct review' ") (citation omitted).

Factors to consider in determining if the operative facts and law of a federal claim were fairly presented include: " '(1) whether the petitioner relied on federal cases that engage in constitutional analysis; (2) whether the petitioner relied on state cases which apply a constitutional analysis to similar facts; (3) whether the petitioner framed the claims in terms so particular as to call to mind a specific constitutional right; and (4) whether the petitioner alleged a pattern of facts that is well within the mainstream of constitutional litigation.' " *Perruquet*, 390 F.3d at 519-20 (citations

omitted). The petitioner is not required to demonstrate that the state appellate court actually addressed the federal claim; he need only show that the issue was fairly presented in the appropriate petition and briefs. *See Dye v. Hofbauer*, 126 S.Ct. 5, 6-7 (2005).

If a claim has been procedurally defaulted in either way, a federal court is barred from granting relief on a habeas claim "unless the petitioner demonstrates cause for the default and prejudice resulting therefrom, or alternatively, he convinces the court that a miscarriage of justice would result if his claim were not entertained on the merits." *Perruquet*, 390 F.3d at 514 (emphasis and citations omitted). Cause is generally "established by showing that some type of external impediment prevented the petitioner from presenting his federal claim to the state courts." *Lewis v. Sternes*, 390 F.3d 1019, 1026 (7th Cir.2004). Prejudice is generally "established by showing that the violation of the petitioner's federal rights 'worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.' " *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)) (emphasis omitted). To show that a denial of a habeas claim will result in a miscarriage of justice, the petitioner must establish "that he is actually innocent of the offense for which he was convicted, *i.e.*, that no reasonable juror would have found him guilty of the crime but for the error(s) he attributes to the state court." *Id.* (citing *Schlup v. Delo*, 513 U.S. 298, 327-29 (1995)).

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**1. Petitioner's first claim is barred because the Petitioner did not fairly present this claim to the state court and because the state court rulings rested on independent and adequate state procedural grounds.**

Hill's first claim asserts that the state failed to prove every element of robbery as a Class A felony. Hill first raised the sufficiency of the evidence in his direct appeal wherein the Indiana Court of Appeals characterized it as follows: "The main thrust of Hill's sufficiency argument is that the evidence must be insufficient to support his convictions because no one ever positively identified him as the person who was at the liquor store on May 9, 2000." *Hill*, 773 N.E.2d at 347. The Court then held that, notwithstanding the lack of eye-witness testimony, there was an abundance of circumstantial evidence upon which the jury could have convicted the defendant. *See id.* at 347-48. His conviction was therefore affirmed. *See id.* at 348. On his direct appeal to the Indiana Supreme Court via a petition to transfer, Hill made only a passing reference to his sufficiency of evidence argument. He merely stated: "Mr. Hill also raised questions regarding the sufficiency of the evidence." (Resp. Ex. H at 9.) Because Hill did not adequately present this issue to the Indiana Supreme Court, Hill has procedurally defaulted on this aspect of his sufficiency of evidence argument and the Court therefore will not entertain this claim. *See Perruquet*, 390 F.3d at 514. He has also failed to show cause for the default and any resulting prejudice, or a miscarriage of justice. *Id.* (citations omitted).

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In his appeal from the denial of his post-conviction relief petition, Hill also raised the sufficiency of the evidence argument but with a new twist and only in the most general of ways. In a 75-page petition, the sufficiency argument is raised on page 74 where Hill stated simply that "the state did not present evidence of injury." (*See* Resp. Ex. J at 74.[1]) This was a different argument than the one raised on his direct appeal wherein Hill argued that the evidence was insufficient because there was no eye-witness testimony. In essence, Hill was now claiming that the State failed to prove that the victim had been "injured" (he was, in fact, shot), and therefore the evidence was insufficient for this reason. The Indiana Court of Appeals rejected this sufficiency of evidence argument, along with all the free-standing claims, and affirmed Hill's conviction, holding that Hill had waived the right to assert any issues that were available, but not raised, on direct appeal. (*See* Resp. Ex. L at 12-13.) Hill presented the sufficiency of evidence claim to the Indiana Supreme Court in his October 2004 amended petition to transfer, which was denied.[2]

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1. In addition to arguing that the circumstantial evidence was not sufficient to prove that the robbery victim suffered a serious bodily injury, Hill raised multiple other free-standing issues not raised in his direct appeal. (*See* Resp. Ex. J at 34-75.)

2. According to Pet.'s Amended Traverse [Doc. 38], Ex. D, the Indiana Supreme Court did not grant Hill's motion to amend his petition to transfer to include the sufficiency of evidence argument. Nevertheless, as a precaution, this Court shall still review this claim as if the issue was properly presented to the Indiana Supreme Court.

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As the last state court to review Hill's sufficiency claim, the decision of the Indiana Court of Appeals was based solely on state post-conviction rules of procedure. As required by *Harris*, the court of appeals clearly expressed that its holding rested on these independent state procedural grounds. *See Harris*, 489 U.S. at 260-61. It is also plain that the Indiana Court of Appeals applied this rule in a principled way because the holding is consistent with established Indiana state law. *See* Ind. P.C. 1 § 1(b) ("This remedy [of post-conviction relief] is not a substitute for a direct appeal from the conviction. . . ."); *Corcoran v. State*, 820 N.E .2d 655, 663 (Ind.2005) (stating that contentions that constitute free-standing claims of error are not generally available for post-conviction review), *aff'd on reh'g*, 827 N.E.2d 542 (Ind.2005); *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind.2001) ("If an issue was known and available, but not raised on direct appeal, it is waived.") (citation omitted).

Because the Indiana Court of Appeals' ruling on this claim was based on the consistent application of clearly expressed state procedural law, it is barred by procedural default unless Hill can demonstrate cause and resulting prejudice, or that denial of the claim will result in a miscarriage of justice. *See Perruquet*, 390 F.3d at 514. Hill has not provided "some type of external impediment" as a reason for the state procedural default, nor has he made any claim that the violation of his federal rights "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Lewis*, 390 F.3d at 1026

(emphasis and citation omitted). Therefore, Hill has not shown cause for the procedural default or any resulting prejudice. Moreover, there was no fundamental miscarriage of justice in this case. *Id.* (citation omitted). Given the overwhelming evidence of Hill's guilt—his fingerprints on the window of the getaway car, the gun used in the robbery found in that same car, the fact that his clothes matched the robber's, and all the other circumstantial evidence—a reasonable juror would have found him guilty despite the errors Hill attributes to the state court. Accordingly, Hill's first claim is barred by procedural default.[3]

**2. Petitioner's second claim is barred because Petitioner did not fairly present this claim to the state court.**

Hill's second claim asserts that the appellate court erred when it held that because Hill was represented by counsel at the time, he could not personally object when the trial court vacated the February 12, 2001 trial date. Hill properly presented this claim to the Indiana Court of Appeals, where his claim was denied. *See Hill*, 773 N.E.2d at 342. Hill filed a petition to transfer to the Indiana Supreme Court on December 4, 2002, but he made only a general reference to this claim, stating that "Mr. Hill preserves his other arguments raised in his direct appeal." (Resp. Ex. H at 9 .) This vague language was not sufficient to alert the Indiana Supreme Court

3. Even if this Court were to reach the merits on Hill's first claim, there is plainly sufficient evidence to uphold the guilty verdict.

to any sort of federal claim. Although the claim was addressed in the court of appeals opinion, the Indiana Supreme Court was not required to look any further than Hill's petition and accompanying briefs. *See Baldwin*, 541 U.S. at 32; *Perruquet*, 390 F.3d at 521. Therefore, the Court finds that Hill's second claim was not fairly presented to the state courts, and that Hill therefore procedurally defaulted on his second claim. Because Hill has not shown any cause for the default, resulting prejudice, or a miscarriage of justice, this claim is barred from the Court's review.

**3. Petitioner's fifth claim is barred because the state court rulings rested on independent and adequate state procedural grounds.**

Hill's fifth claim asserts that the Indiana Court of Appeals erred when it held that Hill waived any speedy trial objections when he failed to renew his objection to postponement of the trial date during the March 16, 2001 pretrial conference. Essentially, he argues that the court of appeals placed form over substance, as the trial court knew Hill objected to the continuance, and would not have required a licensed attorney to renew his objection. Hill properly presented this issue on direct appeal, and in his December 4, 2002 petition to transfer. (*See* Resp. Ex. D at 11; Resp. Ex. H at 5.) The Indiana Court of Appeals rejected this claim on rehearing, and the Indiana Supreme Court denied transfer. *Hill*, 777 N.E.2d at 798-99; *Hill*, 792 N.E.2d at 35.

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The decision of the Indiana Court of Appeals was grounded solely on Indiana Criminal Procedure Rule 4—an independent and adequate state procedural ground. The court concluded that pursuant to Criminal Rule 4, if a trial is postponed, the defendant waives any speedy trial objections unless he objects and moves for discharge. *Hill*, 777 N.E.2d at 798-99. Since Hill did not object after the trial was postponed, the court reasoned that he waived any speedy trial objections. *Id.* at 799. This holding is consistent with Indiana Criminal Procedure Rule 4 jurisprudence. *See Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind.1999) (holding that under Criminal Rule 4, if a defendant fails to timely object to a new trial date, he acquiesces to the delay); *Sweeney v. State*, 704 N.E.2d 86, 102 (Ind.1998) (holding that once a trial is set beyond the limits provided in Criminal Rule 4, the defendant must timely object, or he waives his right to a speedy trial) (citation omitted); *Bell v. State*, 622 N.E.2d 450, 454 (Ind.1993) (holding that a motion for discharge filed prematurely is properly denied pursuant to Criminal Rule 4), *overruled on other grounds by Jaramillo v. State*, 823 N.E.2d 1187, 1190 (Ind.2005).

Because the Indiana Court of Appeals' ruling on Hill's fifth claim was based on the consistent application of clearly expressed state procedural law, these claims are barred by procedural default unless Hill can demonstrate cause and resulting prejudice, or that denial of these claims will result in a miscarriage of justice. *See Perruquet*, 390 F.3d at 514. Hill has not provided "some type of external impediment" as a reason

for the state procedural default, nor has he made any claim that the violation of his federal rights "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Lewis*, 390 F.3d at 1026 (emphasis and citation omitted). Therefore, Hill has not shown cause for this procedural default or any resulting prejudice. As stated previously, there was also no fundamental miscarriage of justice in this case. Accordingly, Hill's fifth claim is barred by procedural default.

**B. Hill's Third and Fourth Claims Were Properly Decided.**

Hill's third and fourth claims—ineffective assistance of trial and appellate counsel—were correctly decided by the Indiana Court of Appeals. As provided by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal court may not grant a petition for habeas corpus based on any claim adjudicated in state court proceedings "unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). " 'Contrary to' means that a federal court may grant the writ only if the state court arrives at a conclusion opposite that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court

on a set of materially indistinguishable facts." *Woods v. McBride*, 430 F.3d 813, 816 (7th Cir.2005) (citing *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000)).

In *Strickland v. Washington*, the Supreme Court determined that a party claiming ineffective assistance of counsel must demonstrate that the alleged acts or omissions of counsel were not the product of "reasonable professional judgment." 466 U.S. 668, 690 (1984). This standard is deferential; counsel is presumed to have acted in a reasonable and professional manner. *See id.* In this case, Hill argues that the trial counsel failed to object to the postponement of the February trial date, improperly withdrew Hill's alibi defense, and requested an extension of the omnibus date that allowed the state time to file additional charges against Hill. He claims that these actions constituted ineffective assistance of counsel. To decide this issue, the Indiana Court of Appeals applied the familiar two-part test of *Strickland.* As the court noted, "petitioner must show both deficient performance and resulting prejudice." (Resp. Ex. L at 7-8, citing *Strickland.*) The court explained that "[d]eficient performance is that which falls below an objective standard of reasonableness[,]" and that "[p]rejudice exists when a defendant shows there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*Id.* at 8.) The Indiana Court of Appeals then correctly noted that the reasonable strategic decisions of trial counsel cannot form the basis of an ineffective assistance of counsel claim. (*Id.* (citing *Azania v. State*, 738 N.E.2d 248, 251 (Ind.2000)).)

Finally, the court noted that to prove ineffective assistance of counsel because of the failure to object, "a defendant must prove that an objection would have been sustained if made and that he was prejudiced by the failure." (*Id.* (citing *Wrinkles v. State*, 749 N.E.2d 1179, 1192 (Ind.2001)).)

Using these standards, the Indiana appeals court held that Hill did not show that any of the claims constituted ineffective assistance of counsel. First, Hill failed to demonstrate that had his trial counsel objected to the delay in the trial, such an objection would have been sustained. In fact, the appeals court specifically stated that such an objection would have been overruled. (*See* Resp. Ex. L at 8.) The court reasoned that the delay in the trial was granted so Hill's own alibi witness could be located and deposed. (*Id.*) Thus, he was not prejudiced by the delay. (*Id.* at 9.) Accordingly, the Indiana Court of Appeals determined that Hill's trial counsel was not ineffective regarding this issue. (*Id.*) Second, Hill later decided that he would rather have a speedy trial than have more delay in tracking down his alibi witness. Accordingly, his attorney withdrew the alibi defense. The court found that Hill cannot then claim that his trial counsel was ineffective on that basis. (*Id.*) Finally, Hill's trial counsel requested an extension of the omnibus date as a strategic decision to investigate the possibility of an alibi defense. The court noted "that even though the extended omnibus date permitted the State to file additional charges, Hill has failed to show that the State would not have otherwise been able to file the additional charges." (*Id.*) Therefore, the court found

that Hill did not prove deficient performance or resulting prejudice on that claim. (*Id.* at 9-10.)

Based on the standard presented in *Strickland*, the Indiana Court of Appeals held that Hill received effective assistance of counsel on all his claims. This decision was not contrary to, or an unreasonable application of, federal law. The Indiana Court of Appeals gave the appropriate level of deference to the decisions made by Hill's trial counsel. Therefore, the claim of ineffective assistance of trial counsel does not present an appropriate grounds for habeas relief.

The same goes for Hill's fourth claim—ineffective assistance of appellate counsel.[4] Even if he fairly presented the issue to the Indiana Supreme Court in his petition to transfer, the Indiana Court of Appeals

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4. The State has argued that Hill's claim of ineffective assistance of appellate counsel is procedurally defaulted because he did not fairly present the issue to the Indiana Supreme Court in his petition to transfer from the denial of his post-conviction relief. While it is true that Hill mentioned ineffective assistance of appellate counsel in his petition to transfer, he did not present sufficient facts and law to support the claim. The petition to transfer did not state the claim in any uniquely constitutional terms, or even mention the Sixth Amendment. Nor did Hill cite any federal or state cases. *See Pierson v. O'Leary*, 959 F.2d 1385, 1392-93 (7th Cir.1992). Nevertheless, because Hill does not prevail on his ineffective assistance of counsel claim, the Court need not decide the procedural default issue. *See Davis v. Vannatta*, 438 F.3d 707, 711 (7th Cir.2006) ("We need not reach the issue of procedural default, however, since [petitioner's] claim fails on the merits.").

correctly decided the matter anyway. To determine whether appellate counsel's failure to raise certain issues was a product of "reasonable professional judgment," the Indiana Court of Appeals applied a two-part test, examining (1) whether any unraised issues were apparent from the face of the record; and (2) whether the unraised issues were "clearly stronger" than the raised issues. (Resp. Ex. L at 10-11 (citing *Timberlake v. State*, 753 N.E.2d 591, 605-06 (Ind.2001) and *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir.1986)).)

Using this test, the court found Hill failed to show that any of his alleged claims of free-standing error were "clearly stronger" than the claims actually raised by Hill's appellate counsel. Accordingly, the Indiana Court of Appeals determined that Hill's appellate counsel was not ineffective, as she exercised reasonable professional judgment in her decision not to present any of Hill's freestanding error claims. (*See* Resp. Ex. L at 12.) The court also held that the appellate counsel "ably raised and presented the speedy trial issue[ ]" and that Hill therefore failed to show that his counsel was ineffective on that basis. (*See id.* at 11.)

Based on the standard presented in *Strickland*, the Indiana Court of Appeals' decision was not contrary to, or an unreasonable application of, federal law. The court acknowledged and applied the "reasonable professional judgment" standard set by the United States Supreme Court, and gave the appropriate level of deference to the decisions made by Hill's appellate counsel. Therefore, Hill's fourth claim also does not present an appropriate ground for habeas relief.

**C. Petitioner's sixth claim is rejected because the ruling of the Indiana Court of Appeals was not an unreasonable application of clearly established federal law.**

Hill's sixth claim alleges that the trial court's erroneous postponement of Hill's trial date at the March 16, 2001 pretrial conference interfered with Hill's trial strategy and thereby violated his Sixth Amendment right to self representation. The trial was postponed because a key state witness had suffered a heart attack. *See Hill*, 773 N.E.2d at 343. Hill objected to the delay, and agreed to stipulate to the testimony of the absent witness pursuant to Indiana Code § 35-36-7-2. *See id.* at 343-44. The trial court erroneously rejected Hill's offer to stipulate and granted the state's motion for continuance. *See id.* at 344-45. Essentially, Hill now claim that this continuance interfered with his strategy to proceed to trial without the state witness. Hill properly presented this claim to the state courts on direct appeal and in his December 4, 2002 petition to transfer. (*See* Resp. Ex. D at 23; Resp. Ex. H at 7.) The Indiana Court of Appeals ultimately rejected his claim and the Indiana Supreme Court denied transfer. *See Hill*, 773 N.E.2d at 345-46; *Hill*, 792 N.E.2d 35.

The Indiana Court of Appeals' ruling on this issue rested on federal jurisprudence. *See Hill*, 773 N.E.2d at 345-46. As stated previously, the AEDPA prohibits the grant of habeas relief unless state court adjudication of the federal claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d).

The Supreme Court has established two core components to the right to self representation: the right to preserve actual control over the case presented to the jury, and the right to have the jury perceive and understand that the defendant is representing himself. *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984). The right to control the case presented to the jury includes the right "to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* at 174. However, a *pro se* defendant is not entitled to absolute control, and "must generally accept any unsolicited help or hindrance that may come from the judge who chooses to call and question witnesses, [or] from the prosecutor who faithfully exercises his duty to present evidence favorable to the defense. . . ." *Id.* at 177, n. 7.

In evaluating Hill's sixth claim, the Indiana Court of Appeals correctly applied the analysis in *McKaskle* to determine that Hill was not deprived of his right to represent himself. While the court recognized that Hill's decision to proceed without the state witness could be considered a tactical decision, it was not central to Hill's

defense. *Hill*, 773 N.E.2d at 345. This Court agrees. Hill was still allowed to question witnesses, argue points of law, and to address the court and jury. *Id.* He also was allowed to place his objection to the continuance on the record. *Id.* at 345-46. Yet as noted in *McKaskle*, Hill was also obligated to accept the help of a judge who felt that the presence of the witness was important. The fact that the trial court overruled his objection was not in itself a violation of Hill's right to represent himself. The decision of the Indiana Court of Appeals was not an unreasonable application of federal law, nor was the decision unreasonable in light of the evidence presented. Therefore, Hill's sixth claim is rejected as an appropriate ground for habeas relief.

## IV. CONCLUSION

For the foregoing reasons, the Petition for Writ of Habeas Corpus is **DENIED.** The Motions for Appointment of Counsel [Doc. 18 and Doc. 45] are **DENIED AS MOOT.** The Motion to Order Respondent to File State Court Record [Doc. 19] is **DENIED AS MOOT.** The Motion for Partial Summary Judgment [Doc. 20] is **DENIED.** The Motion to Amend Judgment [Doc. 22] is **DENIED AS MOOT.** The Motion Objecting to Magistrate Relieving Respondent from Filing State Court Record [Doc. 24] is **DENIED AS MOOT.** The Motion to Order Clerk to Provide Petitioner With File Marked Copies of Pleadings [Doc. 25] is **DENIED AS MOOT.** The Motion Requesting the Court to Provide Petitioner with File Marked Copies of Pleadings [Doc. 36] is **DENIED AS MOOT.** The Amended Motion for Partial Summary Judgment [Doc. 39] is **DENIED.** The Motion to Compel Respondent to Produce Full and Complete State Court Records [Doc. 42] is **DENIED AS MOOT.**

**SO ORDERED.**

ENTERED: March 30, 2006

s/ Philip P. Simon
PHILIP P. SIMON, JUDGE
UNITED STATES DISTRICT COURT

## APPENDIX C — OPINION OF THE COURT OF APPEALS OF INDIANA DATED AUGUST 16, 2002

**IN THE**
**COURT OF APPEALS OF INDIANA**

No. 49A02-0107-CR-440

ASHER HILL,

Appellant-Defendant,

v.

STATE OF INDIANA,

Appellee-Plaintiff.

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant W. Hawkins, Judge
Cause No. 49G05-0005-CF-76761

**August 16, 2002**

**OPINION**

*Appendix C*

**SHARPNACK, Judge.**

Asher Hill appeals his convictions for carrying a handgun without a license, a class A misdemeanor,[1] criminal confinement, a class B felony,[2] and robbery, a class A felony.[3] Hill raises four issues, which we restate as:

I. Whether Hill's right to a speedy trial under Ind. Criminal Rule 4(B) was violated;

II. Whether the trial court's refusal to allow Hill to proceed to trial in the absence of witnesses denied him his Sixth Amendment right to represent himself;

III. Whether the trial court's actions, when combined, denied Hill of his right to free and complete justice under Article I, section 12 of the Indiana Constitution; and

IV. Whether the evidence is sufficient to sustain Hill's convictions.

We affirm.

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1. Ind. Code § 35-47-2-1.

2. Ind. Code § 35-42-3-3.

3. Ind. Code § 35-42-5-1.

*Appendix C*

The facts most favorable to the convictions follow.[4] On May 9, 2000, Gary Barr was working as a cashier at a liquor store on south Sherman Drive in Marion County. Mike Wagner was in the store talking to Barr at the counter. An African-American male ("the robber"), who was five feet, eleven inches tall and was wearing jean shorts, white tube socks, tennis shoes, and a long sleeve, hooded, white shirt or jacket, entered the store. Immediately upon entering the store, the robber shot Barr in the abdomen and grabbed Wagner from behind. The robber walked Wagner around to the back of the counter and insisted that Wagner open the cash register. However, Wagner did not know how to open the register because he did not work at the liquor store. After trying unsuccessfully to open the register, Wagner unplugged it and gave it to the robber. The robber ordered Wagner to get on the floor, a location from which Wagner was able to observe the robber's legs and clothing. The robber threw the cash register to the ground and began kicking it until it finally opened. When the robber left the store, Wagner telephoned the police. The police dispatch report indicated that Wagner's call came in at 9:43 p.m.

At 9:45 p.m. that same night, Earnest Rich was driving on south Sherman Drive, when a mid-sized gray

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4. The State also charged Hill with crimes that were committed in the same liquor store on May 1, 2000. Hill was tried on those charges simultaneously with the convictions appealed herein. However, as Hill was not convicted of the charges related to the May 1st crimes, we have chosen to not provide the facts and procedural history relevant thereto.

*Appendix C*

Mazda came speeding up behind him with its headlights on bright. Rich saw the car leave the road and run into trees on Pleasant Run Parkway. The intersection of Sherman and Pleasant Run Parkway is approximately one-half mile north of the liquor store on Sherman. Rich circled around to the accident scene and found that there was no one in the car. Rich telephoned the police.

Before the police dispatch for the accident occurred, Indianapolis Parks Department Ranger Jerald Knuckles noticed the Mazda against the trees as he was driving by on patrol. When Ranger Knuckles arrived, he noticed that the headlights and windshield wipers were on and that the engine was running. Ranger Knuckles opened the car door and saw a gun on the passenger seat. Ranger Knuckles removed the bullets from the gun and placed the gun and bullets in his patrol car until the police arrived.

The police arrived at the accident scene with Rader, a dog trained to track scents. Rader tracked a scent from the car to Pleasant Run Creek. Because the creek was high from recent rains, the officer took Rader around to the other side of the creek, where Rader was able to find the scent again. Rader tracked the scent from the creek to Pleasant Run Drive near Gale Street.

Also around 9:45 that same night, Hill, who is African American, knocked on the door at the Sterlings' house, which is on Gale Street near Pleasant Run Drive. When Mrs. Sterling saw Hill, he was "out of breath, and sort of frightened" and was wearing knee-length jean pants,

tennis shoes and white socks. Transcript at 206. Hill told her that he had been carjacked and needed to use their phone. Because Hill had trouble using her phone, Sterling made a phone call for Hill. Sterling thought it was unusual that Hill was not calling the police to report the carjacking, so she went to her bedroom and called 9-1-1. At some point, Hill took off his shoes and socks so that he could wring the water out of his socks. The police arrived at the Sterlings' house within minutes of Mrs. Sterling's call.

The police brought Wagner to the Sterlings' house to see if Wagner recognized Hill as the man who committed the robbery and shooting at the liquor store. Wagner reported that Hill's shoes and shorts appeared to be the same as those worn by the robber. In addition, Hill had $392.23, mostly in five-dollar and ten-dollar bills.

Police found money in, and on the ground around, the Mazda. A beige colored coat was found on the bank of the creek. A crime technician found Hill's fingerprint on the driver's side window of the Mazda. On April 9, 2000, the police had conducted a traffic stop of the Mazda, at which time Hill was driving the car, which belonged to his ex-girlfriend. Ballistics tests indicated that the gun found in the Mazda was the gun used to shoot Barr.

The State charged Hill with attempted murder as a class A felony,[5] robbery as a class A felony, criminal

5. Ind. Code §§ 35-41-5-1, 35-42-1-1.

confinement as a class B felony, unlawful possession of a firearm by a serious violent felon as a class B felony,[6] carrying a handgun without a license as a class A misdemeanor, and carrying a handgun without a license as a class C felony.[7] The State also filed informations alleging that Hill was an habitual offender subject to sentence enhancement pursuant to Ind.Code § 35-50-2-8 and that Hill was an habitual offender subject to a sentence of life imprisonment without parole pursuant to Ind.Code § 35-50-2-8.5.

After delays that will be discussed in more detail in subsequent portions of this opinion, a jury tried Hill. The jury found Hill guilty of robbery as a class A felony, criminal confinement as a class B felony, and carrying a handgun without a license as a class A misdemeanor. The jury found that the State had proved that Hill was an habitual offender subject to either an enhancement of years or an enhancement to life without parole. The trial court sentenced Hill to one year for carrying a handgun without a license, which was to be served concurrent with a ten-year sentence for criminal confinement. The trial court ordered that the confinement sentence be served consecutive to a thirty-year sentence for robbery, which the trial court enhanced to life imprisonment without parole.[8]

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6. Ind. Code § 35-47-4-5.

7. Ind. Code § 35-47-2-1.

8. Ind. Appellate Rule 4(A)(1)(a) gives the Indiana Supreme Court exclusive jurisdiction over "Criminal Appeals (Cont'd)

*Appendix C*

I.

The first issue is whether Hill's right to a speedy trial under Ind. Criminal Rule 4(B) was violated. There are no disputed facts regarding this issue; rather, the dispute at issue is whether the delays that occurred are chargeable to Hill or the State. We review this matter de novo. *See Vaughan v. State*, 470 N.E.2d 374, 377 (Ind.Ct.App.1984) (implicitly reviewing an Ind. Criminal Rule 4(B) question about which party was responsible for a delay under a de novo standard), *reh'g denied, trans. denied.*

Ind. Criminal Rule 4(B)(1) provides that if a defendant requests a speedy trial, he shall either be brought to trial within seventy days of his motion or be discharged. *See Underwood v. State*, 722 N.E.2d 828, 831 (Ind.2000), *reh'g denied.* The rule also provides two exceptions that may excuse the State from bringing the defendant to trial within seventy days. *Id.* The first exception applies when the trial court's calendar is too congested to permit a trial for the defendant within seventy days. *Id.;* Ind. Crim. Rule 4(B)(1). The second exception applies when the delay in adjudicating the

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(Cont'd)

in which a sentence of death or life imprisonment without parole is imposed under Ind. Code § 35-50-2-9. . . ." Hill was sentenced to life imprisonment without parole pursuant to an habitual offender enhancement under Ind.Code § 35-50-2-8.5. Because Ind. Appellate Rule 5(A) gives us jurisdiction over all appeals not specifically assigned to the Indiana Supreme Court, we have jurisdiction over Hill's appeal. *See* Ind. Appellate Rule 5(A).

defendant's guilt is caused by the defendant. *Underwood*, 722 N.E.2d at 831; Ind.Crim. Rule 4(B)(1); Ind. Crim. Rule 4(F). When we compute how many days have passed since the defendant's motion for a speedy trial, we include Saturdays, Sundays, and legal holidays. Ind. Crim. Rule 4(B)(2). However, if the seventieth day falls on a Saturday, Sunday, or legal holiday, then the defendant need not be discharged if the State brings the defendant to trial on the first business day following the seventieth day. *Id.; see also* Ind. Crim. Rule 4(E).

Hill requested a speedy trial on May 16, 2000. Hill concedes that his trial was postponed a number of times due to court congestion, and Hill does not question the propriety of those continuances. Rather, Hill claims that there are three continuances that are chargeable to the State against the seventy day deadline. The first continuance at issue is a twenty-eight day delay from February 12, 2001 to March 12, 2001 that occurred because the State needed more time to depose Hill's defense witnesses. The second continuance at issue is a seven day delay from March 12, 2001 to March 19, 2001 that occurred because the State chose the later of two trial dates offered by the trial court. The third continuance at issue is a fifty-six day delay from March 19, 2001 until May 14, 2001 that occurred when the State requested a continuance because Barr would be unable to attend trial due to a health emergency.

The combined total days attributable to those three continuances is ninety-one days. If, as Hill argues, all of these days are chargeable to the State, then the State

exceeded the seventy day deadline for bringing Hill to trial, and Hill must be discharged. If, however, some of these days are not chargeable to the State, then the State may not have exceeded the seventy day deadline, and Hill would not have to be discharged. We address the continuances in chronological order.

The trial court granted the continuance from February 12, 2001 until March 12, 2001 at a pre-trial conference on February 7, 2001. The circumstances surrounding that continuance were as follows. The State had filed a motion to exclude evidence, specifically the testimony of Hill's alibi witnesses, because Hill's witnesses had failed to appear for their depositions. At the conference, Hill was represented by counsel, who had just been appointed to Hill's case a couple of weeks before the conference. The trial court announced that it typically used a "three and out policy" for deciding when a witness had missed too many scheduled depositions and the trial court should grant a motion to exclude. Transcript at 607-608. The trial court asked Hill's counsel to get the witnesses' addresses from Hill again, so that the prosecutor could try one more time to subpoena the witnesses. In addition, the trial court encouraged Hill to discuss with his witnesses the fact that they needed to show up for the depositions. The trial court announced that everyone would "come back here in about a month and see if depositions are still an issue." Transcript at 611. Hill expressed to the trial court his desire to go to trial as scheduled on Monday, February 12th, with or without his witnesses. Nevertheless, his trial was continued.

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A defendant's right to the speedy trial that he requested can be waived. *Vermillion v. State*, 719 N.E.2d 1201, 1204 (Ind.1999), *reh'g denied.* If a defendant fails to object to a delay that results in a later trial date, then the length of that delay extends the time limitations set in Ind. Criminal Rule 4. *Id.* Here, Hill's counsel did not object to the trial court sua sponte granting a continuance of Hill's trial so that the State could depose Hill's witnesses. Consequently, this twenty-eight day delay may not be counted against the seventy day limit that the State had to bring Hill to trial. *See, e.g., id.* at 1204-1205 (holding that a seven day delay caused by a State's motion for continuance was chargeable to the defendant when the defendant did not object).

Nevertheless, Hill claims that he should not be charged with this delay because, even though his counsel did not object to the continuance, Hill personally objected to the continuance and requested to go to trial on Monday, February 12, 2001. Hill's argument fails because if a defendant has counsel, he speaks to the court through his counsel. *Underwood*, 722 N.E.2d at 832. The court is not required to respond to the defendant's objections or motions. *Id.* As our supreme court has said: "To require the trial court to respond to both Defendant and counsel would effectively create a hybrid representation to which Defendant is not entitled." *Id.* Because Hill was represented by counsel, the trial court was not required to grant Hill's request to proceed with a speedy trial. *See Broome v. State*, 694 N.E.2d 280 (Ind.1998), *trans. granted*, 694 N.E.2d 280, 281 (Ind.1998) (summarily affirming the Court of Appeals on this issue).

Hill alleges that there are two other delays that are chargeable to the State. However, we need not analyze whether those delays are chargeable to the State or to Hill because Hill's claim fails regardless. The two remaining delays were seven days and fifty-six days. Their combined total is sixty-three days, which is seven days short of the seventy-day limit provided by Ind. Criminal Rule 4(B). Consequently, Hill cannot demonstrate that the State failed to bring him to trial within the time allotted pursuant to his request under Ind. Criminal Rule 4(B). *See, e.g., Vermillion*, 719 N.E.2d at 1205 (holding that defendant's right to a speedy trial under Ind. Criminal Rule 4(C) had not been violated because portions of the delay were attributable to the defendant).

II.

The second issue is whether the trial court's refusal to allow Hill to proceed to trial in the absence of witnesses denied Hill his Sixth Amendment right to represent himself. Whether the trial court's actions violated Hill's constitutional right to self-representation is a question of law that we review de novo. *See generally Sherwood v. State*, 717 N.E.2d 131 (Ind.1999) (implicitly undertaking a de novo review when determining whether a defendant's Sixth Amendment right to represent himself was violated).

In *Faretta*, the Supreme Court held that a criminal defendant has a Sixth Amendment right to conduct his own defense if he "knowingly and intelligently forgoes

his right to counsel" and he "is able and willing to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173, 104 S.Ct. 944, 948, 79 L.Ed.2d 122 (1984) (citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)), *reh'g denied.* When a defendant demonstrates that he is competent to proceed pro se, he "must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial." *Id.* at 174, 104 S.Ct. at 949. According to the Supreme Court, the policy underlying the right to appear pro se is that we want "to affirm the dignity and autonomy of the accused and to allow the presentation of what may, at least occasionally, be the accused's best possible defense." *Id.* at 176-177, 104 S.Ct. at 950.

To determine whether a defendant's Sixth Amendment right to represent himself has been violated, "the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *Id.* at 177, 104 S.Ct. at 950. In the context of whether standby counsel had interfered with a defendant's right to present his case in his own way, the Supreme Court explained:

> the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. This is the core of the *Faretta* right. If standby counsel's participation over the defendant's objection

> effectively allows counsel to make or substantially interfere with any significant tactical decision, or to control the questioning of witnesses, or to speak instead of the defendant on any matter of importance, the *Faretta* right is eroded.

*Id.* at 178, 104 S.Ct. at 951.

Here, Hill claims that, on two separate occasions, the trial court interfered with Hill's right to represent himself by prohibiting him from proceeding to trial in the absence of witnesses. The first situation about which Hill complains is when, during the pretrial hearing on February 7, 2001, the trial court granted a continuance to allow the prosecutor to depose Hill's witnesses despite Hill's willingness to go to trial without those witnesses. As we discussed earlier in this opinion, at the time when the trial court granted that continuance, Hill was represented by counsel. *See supra* Part I. The trial court's failure to grant Hill's request to proceed to trial without those witnesses could not have denied Hill his right to represent himself when Hill was not representing himself at that point in time. Consequently, this allegation of error fails.

The second situation about which Hill complains occurred during a pretrial conference held on March 16, 2001. By the time of this hearing, the trial court had granted Hill's motion to proceed pro se, and Hill was representing himself. During the March 16th hearing, the State requested a continuance pursuant to

Ind. Code § 35-36-7-2 because one of its witnesses, Barr, had been hospitalized after having a heart attack. The trial court told Hill that he had the option of going to trial on Monday as scheduled if Hill agreed to stipulate that Barr would testify to thirty-three facts and if Hill agreed that the jury could be told Barr's stipulated testimony. Hill decided that he wanted to go ahead with the trial. Nevertheless, the trial court granted the State's request for a continuance.

Hill claims that the trial court erred when it granted the State's request for a continuance pursuant to Ind. Code § 35-36-7-2. That statute provides:

> (a) A prosecuting attorney may move to postpone the trial of a criminal cause because of the absence of a witness whose name is endorsed on the indictment or information, if he makes an official statement:
>
> (1) containing the requirements of subsections (b)(1) and (b)(2) of section 1 of this chapter;
>
> (2) showing that the absence of the witness has not been procured by the act of the prosecuting attorney;
>
> (3) stating the facts to which he believes the witness will testify,

and include a statement that he believes these facts to be true; and

(4) stating that the prosecuting attorney is unable to prove the facts specified in accordance with subdivision (3) through the use of any other witness whose testimony can be as readily procured.

Upon request of the defendant the court shall order that the prosecuting attorney's motion and official statement be made in writing.

(b) The trial may not be postponed if:

(1) after a motion by the prosecuting attorney because of the absence of a witness, the defendant admits that the absent witness would testify to the facts as alleged by the prosecuting attorney in his official statement in accordance with subsection (a)(3); or

(2) after a motion by the prosecuting attorney to postpone because of the absence of written or

> documentary evidence, the defendant admits that the written or documentary evidence exists.

Ind. Code § 35-36-7-2. Hill claims that because he agreed to stipulate to the facts to which Barr would testify, Ind.Code § 35-36-7-2(b)(1) prohibited the trial court from granting the continuance. The State argues that the trial court had discretion regarding whether or not to grant the continuance.

It is true that a trial court has discretion over whether or not to grant a nonstatutory motion for continuance. *Maxey v. State*, 730 N.E.2d 158, 160 (Ind.2000). Accordingly, even though the State's motion for continuance does not meet the statutory requirements of Ind. Code § 35-36-7-2, the trial court still has discretion to determine whether to grant a continuance. *See Baxter v. State*, 727 N.E.2d 429, 432 n. 3 (Ind.2000) (quoting *Bates v. State*, 520 N.E.2d 129, 131 (Ind.Ct.App.1988), *reh'g denied, trans. denied*), *reh'g denied.* This is true because Ind.Code § 35-36-7-2 "merely compels the granting of a continuance under certain clearly delineated circumstances" without restricting the trial court's discretion to grant a continuance in other circumstances. *See Bates*, 520 N.E.2d at 131. Nevertheless, if the factual situation meets the "clearly delineated circumstances" outlined in the statute, then the statute compels the trial court to take the action required by the statute. *See id.* To hold otherwise would be to nullify the statute, which is contrary to the standard of review under which we

interpret statutes. *See, e.g., Livingston v. Fast Cash USA, Inc.*, 753 N.E.2d 572, 575 (Ind.2001) ("We are required to determine and effect the legislative intent underlying the statute and to construe the statute . . . to prevent absurdity. . . . In so doing, we should consider the objects and purposes of the statute as well as the effects and repercussions of such an interpretation."). Consequently, when Hill agreed that the State could present Barr's stipulated testimony pursuant to Ind.Code § 35-36-7-2(b)(1), the trial court did not have discretion to postpone the trial. Consequently, the trial court erred when it granted the State's request for a continuance.[9]

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9. Although Hill does not argue that this error by the trial court, in and of itself, constituted reversible error, we feel compelled to point out that reversible error did not occur. The State requested the continuance because Barr, the liquor store clerk who was shot during the May 9th robbery, was in the hospital due to a health emergency. The Record indicates that Barr was going to testify that Hill robbed the liquor store on May 1st. However, the Record also indicates that Barr did not see the robber who shot him on May 9th. Therefore, Barr's presence at trial did not make Hill's convictions for the May 9th crimes any more or less likely. In addition, despite Barr's presence at trial after it was postponed, Hill was acquitted of the May 1st charges for which Barr identified Hill as the robber. Consequently, Hill cannot demonstrate that he was prejudiced by the trial court's decision to postpone the trial over his objection. Because Hill was not prejudiced, the trial court's error was not reversible error. *See Akins v. State*, 429 N.E.2d 232, 245 (Ind.1981) (holding that "[a]ssuming that it was error for the trial court to grant the continuance, in view of the statute, it does not necessarily follow that a reversal is required" when the defendant was not prejudiced by the trial court's error).

Nevertheless, that error by the trial court did not deny Hill of his Sixth Amendment right to represent himself. Under *McKaskle*, there are two ways in which a defendant's right to represent himself can be violated. *McKaskle*, 465 U.S. at 178, 104 S.Ct. at 951. First, standby counsel could "destroy the jury's perception that the defendant is representing himself." *Id.* As the State notes, this context is not at issue here because there were no jurors present at the March 16th hearing.

Second, the defendant's right to represent himself is violated if the pro se defendant is not allowed "to preserve actual control over the case he chooses to present to the jury." *Id.* Consequently, the pro se defendant must be allowed to make his own tactical decisions and to control the questioning of witnesses. *Id.* For example, if a defendant has standby counsel and they disagree about any matter left to the discretion of counsel during proceedings outside the jury, those disagreements must be resolved in the defendant's favor. *Id.* at 179, 104 S.Ct. at 951.

Here, while Hill's decision to proceed to trial without the presence of Barr could be considered a tactical decision, it was not a tactical decision that was central to the defense that Hill was mounting. *See, e.g.*, *McKaskle*, 645 U.S. at 186-188, 104 S.Ct. at 954-956 (holding that standby counsel's objections and request for a mistrial did not amount to a denial of a defendant's Sixth Amendment right to represent himself when defendant was permitted to conduct voir dire, question and cross-examine witnesses, make objections, and make

an opening statement). The trial court permitted Hill to question all of the witnesses, to argue motions, to object to evidence, and to present his theory of defense. Despite the trial court's error, Hill preserved actual control over the case that he presented to the jury. *See, e.g., id.*

In addition, the fact that the trial court granted the State's continuance over Hill's objection did not deprive Hill of the right to defend himself. A pro se litigant's right to control his defense cannot include a right to control every aspect of the trial court's conduct of a trial. Rather, a pro se litigant should be treated similarly to counsel representing a defendant; he should be allowed to make objections and argue motions. Hill was permitted to place his objection on the record. The fact that the trial court did not do what Hill wanted does not equate with Hill not being allowed to represent himself. To hold otherwise would be tantamount to giving a pro se litigant more control over a trial than a trial court because every motion or objection by that litigant would suddenly have constitutional significance. Hill was not denied his Sixth Amendment right to represent himself. *Cf. Sherwood*, 717 N.E.2d at 137 (holding that defendant was denied his Sixth Amendment right to represent himself "because he was denied actual control of the case presented to the jury" when standby counsel presented a theory of defense that was inconsistent with the defendant's theory of defense).

*Appendix C*

III.

The third issue Hill raises is whether the trial court's actions, when combined, denied Hill of his right to free and complete justice under Article I, section 12 of the Indiana Constitution. Article I, section 12 of the Indiana Constitution provides:

> "All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay."

The first sentence of that provision applies only to civil proceedings. *Sanchez v. State*, 749 N.E.2d 509, 514 (Ind.2001). Consequently, only the second sentence of that provision is at issue here. *See id.*

Hill's argument is difficult to follow. Hill admits that his argument "is not about traditional notions of procedural or substantive due process." Appellant's Brief at 37. Rather, he claims "the trial court's decision[s], taken as a whole, denied Mr. Hill the free and complete administration of justice." Appellant's Brief at 30; *see also* Appellant's Brief at 37. To support his argument Hill asserts "[s]ituations can occur where an accused was denied a fair trial even though legal technicalities were met." Appellant's Brief at 31. However, Hill fails to explain how he was denied a fair trial. He merely asserts that the "technicalities inherent

in the speedy trial rules and the right to represent himself operate to deny Mr. Hill . . . equity and a fair trial." Appellant's Brief at 36. As we have held that Hill's trial comported with the speedy trial rules and Hill's Sixth Amendment right to self-representation, we do not see how he was prejudiced and denied a fair trial by those decisions.

In addition, Hill asserts that "[u]nder the requirement that he only be convicted if he receives a fundamentally just proceeding, there comes a time when the court's failure to intervene in the face of Mr. Hill's ignorance of procedural requirements violates the Indiana Constitution." Appellant's Brief at 32. However, "a litigant who proceeds pro se is held to the same established rules of procedure that trained legal counsel is bound to follow." *Terpstra v. State*, 529 N.E.2d 839, 842 (Ind.Ct.App.1988), *reh'g denied.* One of the risks that a defendant takes when he decides to proceed pro se is that he will not know how to accomplish all of the things that an attorney would know how to accomplish. *See Carter v. State*, 512 N.E.2d 158, 162 (Ind.1987) ("A defendant who proceeds pro se, however, must accept the burdens and hazards of self-representation.") Hill does not claim that the trial court failed to inform him of the risks of proceeding pro se. As Hill knowingly decided that he wanted to proceed pro se despite his lack of legal training, he cannot claim on appeal that he was prejudiced by his own lack of legal knowledge. *See id.* (A defendant "may not assert a Sixth Amendment claim of ineffective assistance of counsel because he, in

effect, would be alleging himself ineffective."). The trial court was not required to step in to protect Hill from himself.

To the extent that Hill is requesting that we interpret Article I, section 12 to include a heretofore unarticulated constitutional right, we refuse his request. Given that Hill's only explanations about how he was prejudiced relate to the arguments that we have already rejected, we need not read a new right into the Indiana Constitution to protect a defendant who has not demonstrated how he was prejudiced.

IV.

The final issue we address is whether the evidence is sufficient to sustain Hill's convictions. Our standard of review for this issue is well settled. *Alkhalidi v. State*, 753 N.E.2d 625, 627 (Ind.2001). We may not reweigh the evidence or reassess the credibility of the witnesses because those tasks lie within the exclusive province of the jury. *Id.* Rather, we view the evidence in the light most favorable to the verdict and determine whether the probative evidence and the reasonable inferences therefrom could have allowed a reasonable jury to find the defendant guilty beyond a reasonable doubt. *Id.*

Based upon both the statute and the charging information, to convict Hill of robbery as a class A felony, the State had to prove: (1) Hill; (2) knowingly; (3) took property; (4) from Barr or from Barr's presence; (5) by using or threatening the use of force on Barr, or by

putting Barr in fear; and (6) Hill's actions resulted in serious bodily injury to Barr, which was specifically a gunshot wound to the abdomen. *See* I.C. § 35-42-5-1; Appellant's Appendix at 143.

To convict Hill of criminal confinement as a class B felony, the State had to prove: (1) Hill; (2) knowingly; (3) while armed with a handgun, which is a deadly weapon; (4) confined Wagner without Wagner's consent by forcing him to lie on the floor. *See* I.C. 35-42-3-3; Appellant's Appendix at 143.

To convict Hill of carrying a handgun without a license, the State had to prove: (1) Hill; (2) carried a handgun on his person or in his vehicle while not at his home, property, or fixed place of business; (3) without a license. *See* I.C. 35-47-2-1; Appellant's Appendix at 143.

The main thrust of Hill's sufficiency argument is that the evidence must be insufficient to support his convictions because no one ever positively identified him as the person who was at the liquor store on May 9, 2000. While Hill's assertion that no one positively identified him as the robber is correct, his assertion that we must therefore hold that the evidence was insufficient to sustain his conviction is incorrect. "[A] criminal conviction may be based solely upon circumstantial evidence." *Woodson v. State*, 542 N.E.2d 1331, 1333 (Ind.1989). The question that we must ask on review is whether "an inference may be drawn from such evidence that supports the fact-finder's conclusion." *Id.*

Here, the evidence indicates that a man, armed with a gun and wearing a white jacket, jean shorts, white tube socks, and white tennis shoes, shot Barr in the stomach, ordered Wagner to open the register and lie on the floor, and stole money from the register at the liquor store. After the robbery, the robber drove from the liquor store and crashed into trees on Pleasant Run Drive. The robber exited the car, leaving behind the gun that he had used to shoot Barr, and then he ran through the creek and toward the vicinity of Gale Street. Between the creek and Gale Street, the police found a beige jacket. Moments later, a winded Hill knocked on the door at the Sterlings' house on Gale Street asking to use the phone. Hill claimed that he had been carjacked, but he called a friend rather than calling the police. Hill was wearing jean shorts, white socks, and white tennis shoes, and he had to take his socks off to wring them out because they were soaked with water. Hill's fingerprint was found on the outside of the window of the driver's side door of the car that the robber had been driving, and Hill had over three hundred dollars in small bills on his person when he was arrested. These facts support an inference that Hill was the person who committed these crimes. *See, e.g., id.* In addition, this evidence is sufficient to support the other elements of the three crimes of which Hill was convicted. *See, e.g., Ortiz v. State*, 716 N.E.2d 345, 352 (Ind.1999) (affirming class A robbery conviction); *Taylor v. State*, 578 N.E.2d 664, 666 (Ind.1991) (affirming conviction for carrying a handgun without a license); *Chapman v. State*, 556 N.E.2d 927, 931 (Ind.1990) (affirming criminal confinement conviction).

For the foregoing reasons, we affirm Hill's convictions for carrying a handgun without a license as a class A misdemeanor, criminal confinement as a class B felony, and robbery as a class A felony.

Affirmed.

FRIEDLANDER, J., and BROOK, C.J., concur.

## APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED APRIL 4, 2008

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**
Chicago, Illinois 60604

April 4, 2008

Before

FRANK H. EASTERBROOK, *Chief Judge*

WILLIAM J. BAUER, *Circuit Judge*

RICHARD A. POSNER, *Circuit Judge*

No. 2:04-CV-206 PS
Philip P. Simon, *Judge.*

No. 06-2777

ASHER B. HILL,

*Petitioner-Appellant,*

v.

BILL WILSON, SUPERINTENDENT,
WESTVILLE CORRECTIONAL FACILITY,

*Respondent-Appellee.*

*Appendix D*

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

**Order**

Petitioner-appellant filed a petition for rehearing and rehearing en banc on March 24, 2008. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.